82-575

No.

Office - Supreme Court, U.S.
FILED
OCT 1 1982
STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, SAN FRANCISCO BULK MAIL CENTER, RICHMOND, CALIFORNIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a labor arbitration case raises issues of Federal law and public policy, may a reviewing court vacate the arbitrator's award and substitute its own judgment of the merits of the dispute on the ground that the arbitrator did not apply the law as interpreted by the court?

2. Where a labor arbitration award is open to a construction that would render its enforcement permissible under Federal law, may a reviewing court nevertheless construe it as impermissible without engaging in its own de novo review of the law and facts?

3. Does the statute providing that Federal employees who participate in a strike against the Government "may not accept or hold a position in the Government" deprive Federal agencies of the discretion to impose sanctions other than discharge against striking employees?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The American Postal Workers Union, AFL-CIO (APWU) petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the decision of the District Court is reported at 682 F.2d 1280 (1982) and is reproduced at pages 1a-14a of the Appendix to this Petition ("A."). The Order of the United States District Court for the Northern District of California denying enforcement and vacating the award of Arbitrator William Rentfro appears at pages 15a-16a of the Appendix. The Award of the Arbitrator appears at pages 17a-21a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1982. By an order entered August 31, 1982, Mr. Justice Rehnquist granted APWU an extension of time, until September 30, 1982, within which to file this Petition.

STATUTES INVOLVED

This case involves section 1208(b) of the Postal Reorganization Act (39 U.S.C. § 1208(b)), and section 7311 of Title 5 of the United States Code (5 U.S.C. § 7311). Section 1208(b) of Title 39, which is modeled after section 301(a) of the Labor Management Relations Act of 1947 (29 U.S.C. 185(a)), provides:

> (b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.[1]

Section 7311 of Title 5 provides, in pertinent part:

> An individual may not accept or hold a position in the Government of the United States, . . . if he—
>
> > (3) participates in a strike, or asserts the right to strike against the Government of the United States or the government of the District of Columbia; . . .

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[1] Section 185(a) of Title 29 provides:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. The 1978 Labor Dispute And The Actions of the Discharged Employee

The petitioner APWU is the recognized collective bargaining representative of over 300,000 Postal Service employees. The grievant, Michael Murphy, was a member of the APWU and a Postal Service employee. He was first hired on August 27, 1977. He was transferred to the San Francisco Bulk Mail Center in June of 1978 and worked there until he was discharged on July 27, 1978.

Mr. Murphy was discharged for alleged strike activity. The activities in question occurred on July 22, 1978. On that day a number of Mr. Murphy's fellow employees were picketing the entrance to the Bulk Mail facility when he arrived there for work. The picketers were protesting the terms of a new collective bargaining agreement entered into between APWU and the Postal Service. (Arbitrator's Opinion) ("Arb. Op."), A. 18a).

Mr. Murphy was aware that negotiations for a new contract between APWU and the Postal Service were in progress and, in fact, the night before, had received a call informing him that there would be a strike at the facility the next day and requesting his support. He arrived at the facility the next morning an hour and fifteen minutes before starting time to investigate the situation before he made any decisions. (Id., A. 18a) Upon arrival, Mr. Murphy recognized a number of co-employees and some union officials among the picketers. He questioned them about their activities. While no picketer physically threatened him, Murphy expected verbal abuse of anyone crossing the picket line and was fearful of future reprisal. (*Id.*, A. 18a). In the words of the arbitrator whose award is at issue here, Murphy "concluded that he would not attempt to enter the facility for fear of future reprisal" (*Id.* 18a).

Murphy thereupon called the Bulk Mail Center and informed management that he was afraid to cross the picket line to report for work. After his call he engaged in picketing activities until 10:30 or 11:00 a.m. before leaving.[2]

Murphy returned to the Bulk Mail Center later that afternoon. At that time he first discovered that the strike was not sanctioned by the union leadership. Upon receipt of this information, Murphy decided that he would not offer further support for the work stoppage.

The picket line remained intact for the next few days. Murphy reported to work each of the next three days, but was unwilling to cross the picket line. He called the facility each day to inform them that he was not willing to cross the picket line and then returned home without offering support of any sort for the picketers. On July 27, 1982 he received a formal notice of termination from the Postal Service.

B. The Proceedings Before the Arbitrartor

Pursuant to the collective bargaining agreement between the APWU and the United States Postal Service an arbitration hearing was held before arbitrator William E. Rentfro on June 21, 1979. A letter award reinstating Murphy without back pay was issued on October 4, 1979. On December 31, 1979 the Arbitrator issued a formal opinion giving the rationale for his decision.

Arbitrator Rentfro first observed that he and other arbitrators had already issued "a variety of arbitral decisions concerning discharged employees" in cases arising from work stoppages at the Bulk Mail Centers in Richmond and Jersey City during the same labor dispute. (A. 20a). He then stated (*id.*):

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[2] When asked at the arbitration hearing why he had engaged in such activities, Murphy stated: "I felt safer by not crossing the line. And secondly, I was one of them because I was in their union, worked with them." (Arb. Op., A. 19a)

> The broader legal issues pertaining generally to all cases have been treated at length by this Arbitrator and others. It is fairly settled, at least among the respective arbitrators, that each case is to be evaluated on its own merits with reference to the intentions of the alleged striker, the nature and extent of his or her participation, the effects of that participation, and any unique circumstances tending to mitigation. Examination of cases on such an individualized basis necessarily involves resolutions of credibility, assessments of motive, and other factors of a highly intangible nature. (A. 20(a))

Finally, he held:

> The penalty of discharge is too severe in view of Grievant's potential for becoming a valuable Postal Service employee, and particularly in view of the destructive effect that sustaining the discharge would in all likelihood have upon his prospects for future employment. Given the mitigating circumstances present here, the Arbitrator is neither constrained nor persuaded to uphold the termination. (A. 21(a))

C. Proceedings in the District Court and Court of Appeals

The Postal Service refused to reinstate grievant Murphy, claiming that such an action would constitute a violation of a Federal law (5 U.S.C. § 7311), which provides that "An individual may not accept or hold a position in the Government of the United States" if he has participated in a strike against the United States. The APWU then brought an action in the United States District Court for the Northern District of California to enforce the arbitration award.[3] After hearing oral argument on APWU's motion for an order to show cause why the

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[3] The District Court had jurisdiction under Section 1208(b) of the Postal Reorganization Act of 1970 (39 U.S.C. 1208(b)) which is modeled after Section 301 of the LMRA of 1947, as amended, (29 U.S.C. § 185).

award should not be enforced, the court denied enforcement and vacated Arbitrator Rentfro's award. The court's Order stated:

> The Court concludes that an arbitration award which compels the performance of an illegal act cannot be enforced. *Glendale Mfg. Co. v. Local 520 ILGWU*, 283 F.2d 936 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961). The Court has therefore determined that the award herein must be vacated. *Sobel v. Hertz, Werner & Co.*, 469 F.2d 1211, 1215 (2nd Cir. 1972). (A. 15(a))

The APWU appealed the District Court's ruling to the Court of Appeals for the Ninth Circuit, which upheld the District Court. The Court of Appeals' rationale was twofold. First, according to the court, the award reinstating Murphy constituted manifest disregard for the law as interpreted by the Court—in this instance 5 U.S.C. § 7311. (A. 5a-6a). Second, the Court held that even if the Rentfro award was not so clearly contrary to law as to constitute manifest disregard for the law, reinstatement of Murphy would be illegal:

> We conclude that Murphy participated in a strike against the Postal Service. His reinstatement would violate 5 U.S.C. § 7311. That is the only conclusion which the facts of this case can support. In light of these facts, remand would be futile because . . . we could not accord judicial deference to any other conclusion by the arbitrator. (A. *8a*).

Notably, one member of the panel dissented from this ruling, on grounds that the Arbitrator's opinion did not support the majority's conclusion that Murphy participated in the strike in violation of law (A. 10a-11a). The dissenting judge stated (A. 14a):

> The majority's basic position, then, is not that the arbitrator unambiguously found Murphy to have participated in the strike, nor that a contrary conclusion would require "manifest disregard of the

law." It is, quite simply, that the majority has assumed the role of deciding whether Murphy participated in the strike, and has decided that he did. With all due respect, it is for the arbitrator, not this court, to make that decision. Consequently, I must dissent from the unwarranted and unjust disposition which the majority arrives at in this case.

REASONS FOR GRANTING THE WRIT

The decision below decides two important questions concerning the scope of judicial review of arbitration awards in cases where the awards raise issues of Federal law and public policy, and does so in a way which conflicts with this Court's decisions and with rules governing review of arbitration awards stated in other circuits. These issues are central to national labor policy, and are recurring and important.

In addition, the court below has misconstrued the federal law barring employment of persons who participate in strikes, 5 U.S.C. § 7311, to require Federal agencies to discharge any employee who can be said to have engaged in strike activity to any extent and no matter what the circumstances. The question as to whether Congress has mandated such a harsh uniform response is of crucial importance to federal employees and to the future of labor relations in the federal sector. The approach to this question delineated by the Ninth Circuit is not supported by the language of the statute and is contrary to the understanding of 5 U.S.C. § 7311 articulated by both the Second and Seventh Circuits.

1. More than twenty years after this Court explained the nature and scope of judicial review of arbitration awards in the Steelworkers Trilogy,[4] the Court of Appeals has fashioned and applied a completely different

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[4] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

standard of review. According to the Court of Appeals, when it is arguable that a federal law bears on the matter, the arbitrator's determination is to be overturned unless that determination is the one the Court would have made in applying the statute.

In contrast, this Court has held that an arbitrator must confine his judgment to construction of the contract. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 at 597 (1960). An arbitrator who bases his decision not on the contract, but on ". . . the requirements of enacted legislation . . . exceed[s] the scope of [his] submission." *Id.*

For this reason, the Court of Appeals' concern that the arbitrator did not show proper regard for the law is misplaced. Unless directed to do so by the contract, an arbitrator is not permitted to base an award on a construction of law. While he may look to the law for guidance, ". . . to determine the sense of the agreement . . .", his interpretation must be based on the contract, not the law. *Enterprise Wheel & Car Corp., supra*, at 598. In this case, apart from the Court of Appeals' concern for the proper application of 5 U.S.C. § 7311, there is no contention that the arbitrator's award does not draw its essence from the collective bargaining agreement.[5]

This Court's pronouncements on the role of labor arbitrators are plain and unequivocal.[6] In light of this, it

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[5] The contract between the APWU and the Postal Service does not incorporate or direct the arbitrator to apply 5 U.S.C. § 7311. Article 18, the No-Strike provision, states, in pertinent part:

> Section 1.
> The Unions in behalf of their members agree that they will not call or sanction a strike or slowdown.

[6] Notably, the Ninth Circuit's authority for its "manifest disregard" standard is drawn primarily from cases involving standard commercial arbitrations. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953); *Sobel v. Hertz, Werner & Co.*, 469 F.2d 1211, 1214 (2nd

is not surprising that the rule stated by the court below is in direct conflict with the majority view in the Courts of Appeals. *E.g. Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 803 (5th Cir. 1973) ([t]he arbitrator has no obligation whatsoever to abide by the N.L.R.A. . . ."); *NLRB v. Horn & Hardhat Co.*, 439 F.2d 674, 678 (2nd Cir. 1971) (function of an arbitrator is to ". . . discern the intentions of a party to a contract . . . [t]he interests of third parties, such as an individual employee or the public, are not his primary concern.")

Nevertheless, despite the apparent clarity of the principles set forth in the trilogy and its progen y, the confusion of the court below is not unique. A petition for certiorari raising very similar issues—concerning the extent to which an arbitrator is compelled to consider Federal law in rendering a judgment on a contractual dispute—was granted June 28, 1982. *W. R. Grace & Co. v. Local Union No. 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, No. 81-1314, cert. granted, 73 L.Ed. 1365. Certiorari should be granted

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Cir. 1972); *San Martine Compania de Navegacion v. Saguenay Terminals Limited*, 293 F.2d 796, 801 (9th Cir. 1961); *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568 (2nd Cir. 1968). The principle for review articulated from these cases was applied despite this Court's clear instruction that courts must distinguish between review of commercial and labor arbitration:

> . . . the run of arbitration cases, illustrated by *Wilko v. Swan*, 346 U.S. 427 becomes irrelevant to our problem. . . . In the commercial cases, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under any ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself. [*United Steelworkers v. Warrior & Gulf N. Co., supra*, 363 U.S. at 578.]

here and this case should be consolidated with No. 81-1314.

2. To be sure the Court of Appeals' did not only conclude that federal law has an impact on the matter at issue here, but that enforcement of the Rentfro award would compel the Postal Service to perform an illegal act.

However, as the Ninth Circuit had previously recognized ". . . public policy should not be turned into a facile method of substituting judicial for arbitral judgment." *Amalgamated Transit Union v. Azetc Bus Lines*, 654 F.2d 642, 643 (9th Cir. 1981), quoting Danau, *Three Problems in Labor Arbitration*, 55 Va. L. Rev. 427 (1969). Accordingly, the prevailing view in the Court of Appeals is that while the court and not the arbitrator must interpret the law, a reviewing court should avoid, if possible, interpretations of an award which make that award invalid.

Thus, for example, in direct conflict with the Ninth Circuit's approach here, the Third Circuit has deferred to an arbitrator's award denying reinstatement of a discharged employee in the fact of a claim that the award was repugnant to the NRLA so long as the conduct leading up to the discharge was "arguably unprotected." *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 375 (3rd Cir. 1980). Obviously, no such deference was given Arbitrator Rentfro by the Court of Appeals. For, as is pointed out in the dissent, the arbitrator's opinion is ambiguous in a number of crucial respects and is devoid of any finding that Murphy participated in the strike. (A. 11a). Indeed, the facts are quite consistent with a conclusion that Murphy did not engage with his fellow employees in a concerted stoppage of work.[7]

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[7] Strikes are defined in the National Labor Relations Act as follows:

> "The term strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason

Even presuming that no deference at all is appropriate for a court reviewing a labor arbitration award against a claim that it contravenes the law or public policy, the Tenth Circuit has ruled that the courts are obligated to conduct a *de novo* review of the law and facts where there is a claim that the award required illegal conduct. *Communications Workers of America v. Mountain States T & T*, 102 LRRM 2161 (10th Cir. 1978); *Telephone Workers Union v. New Jersey Bell*, 45 F. Supp. 284, 296 (D.N.J. 1977), aff'd, 584 F.2d 31 (3rd Cir. 1978); *cf. Alexander v. Gardner-Denver Co., supra.* No such review occurred in the instant case—the court simply examined the arbitrator's opinion and found it repugnant to the policy against Federal employee strikes.

3. The Ninth Circuit's treatment of the arbitration award in question is predicated on its interpretation of the Federal law prohibiting strikes against the government. Murphy's reinstatement by the Postal Service would, the majority concluded, violate 5 U.S.C. § 7311. (A. 9a). Based on this judgment, enforcement was denied.

The Ninth Circuit's conclusion on this important question of Federal law is wrong. Assuming arguendo that Murphy actually did participate in a strike (a conclusion the dissenting judge regarded as unwarranted), the statute does not say that a Federal agency is *compelled* to discharge a strike participant. Indeed, the statute on its face circumscribes only the conduct of government employees, not the discretion of government agencies.

The most reasonable interpretation of 5 U.S.C. § 7311 is that it grants the Postal Service the authority to dis-

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of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees." (29 U.S.C. § 142(a).)

The arbitrator found that Murphy was intimidated by the strikers and "concluded that he would not attempt to enter the facility for fear of future reprisal" (A. 18a). In this context, the fact that Murphy briefly participated in picketing activity does not require the conclusion that he participated in the strike.

charge strikers rather than imposing on the service the obligation to make such discharges. While no Court of Appeals has previously faced this issue in the context of an arbitrator's award to reinstate a striker, other courts have held that a government agency has wide discretion in determining appropriate discipline for strike activity, and that discharge is not the only lawful response. In *United States v. Patco*, 653 F.2d 1134, 1141 (7th Cir. 1981) (holding injunction against a slowdown by air traffic controllers could be issued pursuant to 5 U.S.C. §7311), the Court noted:

> . . . the district court viewed the criminal penalty of 18 U.S.C § 1918 and the termination of employment implicit in the terms of 5 U.S.C. § 7311 as the exclusive remedies for engaging in the prohibitive conduct. We disagree with that conclusion . . . dismissing or indicting the air traffic controllers involved in the slowdown would not be a viable remedy for the Government. First, terminating a substantial number of controllers would seriously impair the FAA's ability to provide the public with this essential service; this is precisely the sort of result that the statutory provisions were intended to prevent. Second, indicting or terminating the controllers after a strike does nothing to prevent the strike and the serious consequences that would surely follow.

Similarly, in another Patco case, *United States v. Patco*, 438 F.2d 78, 82 (2nd Cir. 1970) the Court stated "[t]here is substantial question whether this statute must be read in a manner which would require the government to dismiss all controllers and thereby end air travel service until replacements could be trained." See also *Ogden v. Department of Transportation*, 430 F.2d 660 (6th Cir. 1971) and *McTiernan v. Gronouski*, 337 F.2d 31, 34 (2nd Cir. 1964). Thus, the Ninth Circuit's judgment that 5 U.S.C. § 7311 requires discharge of a striker is unsupported by the language of the statute and in conflict with the decision of other circuits.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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